

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Aluminum Company of America and Craig Elliott.

Case 26-CA-19014

September 23, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On November 3, 1999, Administrative Law Judge William N. Cates issued the attached bench decision, supplemented by a written certification and Order dated December 1, 1999. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Craig Elliott on December 16, 1998, because he engaged in the protected concerted activity of raising issues under a collective-bargaining agreement. We reverse. Even assuming that Elliott was engaged in protected concerted activity during each of the incidents that precipitated his discharge, we find that the profane nature of his outbursts on each occasion removed the Act's protection. We therefore find that the Respondent lawfully discharged Elliott.

FACTS

The Respondent is engaged in the manufacture of aluminum-based products. The Respondent and the Union have had a longstanding collective-bargaining relationship dating back to the 1950's. Their current collective-bargaining agreement is effective from May 31, 1996, to May 31, 2002. That agreement provides for a comprehensive grievance and arbitration system, but it permits the nongrievable discharge of an employee for any reason during a 60-day probationary period.

In 1998, the Respondent employed approximately 350 bargaining unit employees at its Arkansas facility. It had reduced its workforce considerably over the last several

years because of an economic downturn. As a result, since 1982, the Respondent had hired only 15 or 16 new employees. In 1998,² it did hire four new craft employees, including alleged discriminatee Elliott. He was hired on October 19 for the general maintenance dayshift on the Respondent's C&E crew. The Respondent discharged Elliott on December 16, before the expiration of his 60-day probationary period. The other employees hired that year were still working for the Respondent at the time of the hearing in this case.

About November 16, Supervisor James Barrett notified Elliott and fellow probationary employee Bill Knight of a shift change. Believing that the notification was not timely, Elliott complained to Harold Chronister, a union grievance representative for the maintenance employees. Chronister spoke with Supervisor Don Mitchell about the problem. Mitchell replied that there was no violation of the contract. Chronister then spoke with Maintenance Manager Jack Leggett. A written grievance on the schedule change was submitted, naming both Elliott and Knight as the aggrieved employees. The parties eventually settled this grievance, possibly after Elliott's discharge, to his admitted satisfaction.

On approximately November 21, Supervisor Mitchell assigned weekend overtime to Elliott and three other probationary employees. When Elliott questioned whether Mitchell was acting consistent with established overtime practices, Mitchell assured Elliott that he was. On November 28, Elliott checked with Chronister about Mitchell's handling of this overtime. Chronister told Elliott that Mitchell had violated the contract. Later, union grievance committee person Richard Solomon spoke with Manager Leggett about the overtime issue. A grievance was filed on behalf of all four affected employees, and, once again, the grievance was eventually settled to Elliott's admitted satisfaction.

On December 11, Elliott entered an employee breakroom in the plant with two other employees. Supervisor Fred Tucker and other employees were already present in the room. According to Tucker's credited testimony, Elliott looked directly at Tucker and stated twice, in a voice loud enough to be heard by everyone, "Wonder how Kid Mitch [supervisor Mitchell] is going to fuck us now"? Tucker thereafter went to Manager Leggett and inquired about the procedure for dealing with probationary employees before the expiration of their probationary period. Leggett said that he would check.

On December 14, the next workday, Elliott observed Supervisor Barrett several times performing bargaining unit work. Eventually, Elliott approached committeeman

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² All subsequent dates are in 1998, unless otherwise stated.

Solomon in a breakroom and began to protest Barrett's actions. Elliott stated that "if the son of a bitch," referring to Barrett, "wanted to be a maintenance man, to get tools, or to get his a— back in the office." Elliott requested that a grievance be filed and told Solomon in a loud voice (Solomon was hard of hearing), "so you're telling me what we have is chicken-s— bosses out here." A several-minute tirade followed, punctuated with other expletives, including references to supervisors as "those mother fuckers" and accusations that they were trying to "pull some bullshit."

Elliott admitted knowing that Supervisor Mitchell was in the breakroom, which adjoined Mitchell's office. Mitchell credibly testified that two of the employees who witnessed Elliott's outburst came to Mitchell afterwards and stated that he should not tolerate that type of behavior by an employee.

After this incident, Mitchell encountered Supervisor Tucker. The two supervisors discussed Elliott's conduct on December 11 and 14. They then went to Maintenance Manager Leggett. Both supervisors reported what they had seen and heard. They expressed concern about Elliott becoming a full-time employee after completing his probationary period. Based on their reports and concerns, Leggett recommended to human resources manager, Paula Lattanzi-Higgs, that Elliott be discharged. The credited testimony shows that Leggett understood that Elliott was initiating the filing of a grievance on December 14 and that he had previously been involved in the grievances over the shift schedule change and the overtime assignment.

Lattanzi-Higgs did discharge Elliott on December 16, telling him that the Respondent did not need his type and his kind. Elliott returned for a second meeting with union representatives, who queried Lattanzi-Higgs about the basis for Elliott's discharge. She responded that Elliott would not fit into the Respondent's work environment.

From at least 1974 until Elliott's filing of an unfair labor practice charge here, it is undisputed that the Respondent has not been subject to any claim, charge, or grievance of an employee alleging discrimination or retaliation for filing a grievance. During 6 to 8 of nearly 30 years in the bargaining unit prior to his promotion to supervisor, Supervisor Mitchell had been the union grievance representative for the Respondent's craft employees. In that capacity, Mitchell had been involved in hundreds of grievances. According to Lattanzi-Higgs, Mitchell had himself filed a "warehouse" full of grievances. Similarly, Supervisor Tucker had been an officer or grievance committee representative for the Union for

most of his 29 years as a unit employee. Tucker also filed many grievances.

It is undisputed that profanity is common in shop talk at the Respondent's facility. Elliott admitted that he himself frequently used profanity, except in a courtroom or church. Still, the Respondent offered evidence that, from 1987 through 1997, two employees had been discharged and four others disciplined, at least in part, for abusive language.³ Union president, Dan Henry, also acknowledged that, in support of a 1996 grievance, he had protested an alleged double standard under which the Respondent countenanced supervisory profanity but disciplined employees for engaging in similar conduct.

ANALYSIS

There is no question that Elliott's invocation of a collective-bargaining agreement's terms and his participation in the filing of grievances were protected concerted activity. *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966). Consequently, in assessing the legality of Elliott's discharge, there is a critical threshold issue about the relationship of his protected activity to the otherwise unprotected misconduct. The judge found that "the profanity for which the Company contends Mr. Elliott was discharged, arose out of, at least in part, Elliott's attempt to find a union representative so that he might file a grievance." The judge then found it appropriate to use a *Wright Line*⁴ analysis to assess the legality of the Respondent's motivation for Elliott's discharge.

Even assuming, *arguendo*, that Elliott was engaged in protected concerted activity on both December 11 and 14, and that his profane behavior was integrally related to this protected concerted activity, we would not find a violation here. Under these assumed circumstances, the only issue is whether Elliott's profane conduct caused him to lose the protection of the Act. See, e.g., *Felix Industries*, 331 NLRB 144 (2000), enf. denied and case

³ The discipline included: an employee discharged for cursing and threatening a supervisor; an employee given a written warning for demonstrating "a belligerent (sic) and disrespectful attitude"; an employee given a 3-day suspension for being verbally abusive to the plant dispensary nurses and physician and for refusing to report to his jobsite; an employee given a written warning for unprovoked verbal abuse of the plant dispensary supervisor and a nurse at a time when the dispensary was full of employee patients; an employee discharged for cursing and screaming at a security officer; and an employee given a written warning for cursing a supervisor and sticking a pallet label on his chest. (Both of the discharged employees were reinstated, the former because of his 25-year tenure with the Respondent without any other disciplinary action and the latter by means of an arbitration decision.)

⁴ *Wright Line*, 251 NLRB 1083 (1980), enf'd, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

remanded 251 F.3d 1051 (D.C. Cir. 2001).⁵ We find that Elliott lost the protection of the Act, based on the location of Elliott's profane outbursts, their comparative severity, and their occurrence in a stable labor relations environment free of any apparent employer opposition to employee grievances.

First, neither of the profane outbursts involved face-to-face meetings with management where Elliott sought to present his grievances. Instead, they took place in employee breakrooms, where Elliott's sustained profanity could be overheard by coworkers and would reasonably tend to affect workplace discipline by undermining the authority of supervisors subject to his vituperative attacks.

Second, Elliott's profanity far exceeded that which was common and tolerated in his workplace. As previously stated, the record shows that some degree of profanity was quite common to the Respondent's plant and to Elliott's parlance. What the record does *not* show, however, is that the degree and manner in which Elliott used profanity was common or accepted by anyone in the Respondent's plant. In fact, no witness asked to recall behavior comparable to Elliott's could do so. Tucker, who had been an aggressive advocate of union grievances for several years, testified that he had never witnessed such conduct as Elliott's December 11 remonstrations. Mitchell testified that two employees volunteered to him their view that Elliott's December 14 tirade should not be tolerated. Furthermore, the Respondent documented several prior instances of discipline, including discharge, for employees whose misconduct included abusive or profane language.

Finally, Elliott's repeated, sustained, ad hominem profanity cannot be excused as an emotional outburst provoked by any opposition from the Respondent's officials

to his grievance activity. On the contrary, the Respondent did not bear any apparent animus against employees for pressing contractual grievances. In particular, the Respondent expressed no animosity when Elliott participated in the filing of the two grievances in November. This acquiescent attitude was consistent with a long-standing collective-bargaining relationship between the Respondent and the Union, during which hundreds of grievances have been processed. These include the many grievances filed by former union representatives and current supervisors, Mitchell and Tucker, the two supervisors most directly subjected to Elliott's profanity, whose reports of Elliott's misconduct provided the basis for his discharge.

Based upon all the above factors, we find that, even assuming that Elliott's profane declamations occurred in the context of protected concerted activities, the profanity removed the Act's protection.⁶ Under these assumed circumstances, the *Wright Line* analysis used by the judge is not relevant to the unfair labor practice issue presented. See, e.g., *Honda of America Mfg.*, 334 NLRB No 99, slip op. at 3 (2001). The *Wright Line* analysis would only be necessary to resolve a case alleging a violation which turns on disputed motivation. Specifically, the analysis is used first to determine whether the employee's union or other protected activity actually was a motivating factor in the respondent's discipline of the employee and then to determine whether the respondent would have taken the same action based on an independent, nondiscriminatory motivating factor even in the absence of such activity.

Here, however, we have assumed a causal connection between Elliott's protected activity and the discipline he received. The only issue is whether Elliott's use of profanity removed the Act's protection. We have found that it did, and we shall dismiss the complaint on that basis.

ORDER

The complaint is dismissed.

⁵ Member Cowen agrees with his colleagues that employee Elliott's profane tirade was not protected by the Act and that the Respondent lawfully disciplined Elliott for that behavior. In doing so, Member Cowen does not pass on the analysis set forth in *Felix Industries*, which applied the *Atlantic Steel* factors to an employee's use of profanity during a grievance-related telephone conversation with a supervisor. See *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979). Member Cowen finds Elliott's discipline to be lawful regardless of whether a *Felix/Atlantic Steel* analysis or a *Wright Line* analysis is applied. Under *Felix/Atlantic Steel*, Elliott's profane tirade is viewed as "integrally related" to conduct that the majority assumes, arguendo, to be otherwise protected by the Act. All of this conduct is then viewed as a whole to determine its protected status. Under *Wright Line*, the General Counsel must prove that the "assumed" protected conduct was a motivating factor in the Respondent's discipline of Elliott. If the General Counsel sustains this burden, Elliott's profane tirade is then considered as part of the Respondent's defense. Under either analysis, the General Counsel has failed to sustain its burden of proving that Elliott was disciplined, in whole or in part, for engaging in activity that is protected under the Act.

⁶ See generally, *Piper Realty Co.*, 313 NLRB 1289 (1994); *Woodnuff & Sons*, 265 NLRB 345 (1982); *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979).

Dated, Washington, D.C. September 23, 2002

Wilma B. Liebman, Member

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Bruce E. Buchanan, Esq., for the General Counsel.

Tim Boe, Esq., and David Martin, Esq., for the Company.

Craig Elliott, Pro se.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is a wrongful discharge case. At the close of trial in Little Rock, Arkansas, on November 3, 1999, I rendered a Bench Decision in favor of the General Counsel (Government) thereby finding a violation of 29 U.S.C. 158(a)(1) and (3). This certification of the Bench Decision, along with the Order which appears below, triggers the time period for filing an appeal (Exceptions) to the National Labor Relations Board (Board). I rendered this Bench Decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by Aluminum Company of America (Company), I found the Company violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act), when on December 16, 1998, it discharged its probationary employee Craig Elliott (Elliott) because of his concerted protected activity of raising issues he perceived were addressed in the Company's collective-bargaining agreement with United Steelworkers of America, Local 4880, the representative of Company employees including Elliott. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). I rejected the Company's contention that Elliott should be governed by a higher conduct standard because he had not completed his probationary period. I also rejected the Company's contention that Elliott's conduct in pursuit of his contractual rights was "negative behavior so pervasive that it simply should not be treated" as protected by the Act. I concluded Elliott's conduct was not of such serious character as to render him unfit for further service with the Company. See: *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976), *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965), and *Caterpillar, Inc.*, 321 NLRB 1178, 1180 (1996). Finally, I rejected the Company's contention it was not in any manner wrongfully motivated in discharging Elliott. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

I certify the accuracy of the portion of the transcript, as corrected,¹ pages 498 to 519, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in the particulars and for the reasons stated at trial and summarized above and that its violations have affected and, unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found the Company discriminatorily discharged its employee Craig Elliott, I shall recommend he, within 14 days from the date of this Order, be offered full reinstatement to his former job, or if his job no longer exists to a substantially equivalent position, without prejudice to his seniority, or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also recommend that the Company, within 14 days from the date of this Order, be ordered to remove from its files any reference to Elliott's unlawful discharge and, within 3 days thereafter, notify Elliott in writing that this has been done and that his discharge will not be used against him in anyway. Finally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate Notice to Employees, copies of which are attached hereto as "Appendix B"² for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law, and on the entire record, I issue the following recommended³

¹ I have corrected the transcript pages containing my Decision and the corrections are as reflected in the attached Appendix C [omitted from publication].

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Company, Aluminum Company of America, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer Craig Elliott full reinstatement to his former job, or if his job no longer exists to a substantially equivalent job without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify Craig Elliott, in writing that this has been done and his discharge will not be used against him in any way.

(c) Preserve, and within 14 days of a request, make available to the Board or its agents, for its examination and copying, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(d) Within 14 days after service by the Regional Director of Region 26 of the National Labor Relations Board, post at its Bauxite, Arkansas facility, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 26 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all employees at its Bauxite, Arkansas, facility, employed by the Company on or at any time since December 16, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 26 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated at Washington, D.C. December 1, 1999

498

APPENDIX A

DECISION

WILLIAM N. CATES, Administrative Law Judge. I heard this case in trial proceedings conducted on

499

November 1 and 2, 1999, in Little Rock, Arkansas.

This morning, November 3, 1999, I heard oral argument by Counsel for the General Counsel, and Counsel for the Company.

Counsel for the General Counsel and Counsel for the Company also filed pre-trial briefs, which I have considered. I am issuing this bench decision, pursuant to Section 102.35(a)(10) of the National Labor Relations Board Rules and Regulations. And in doing so, I shall set forth findings of fact and conclusions of law.

This is in the matter of Aluminum Company of America and Craig Elliott, an individual, Case No. 26-CA-19014. This is an unfair labor practice case prosecuted by the National Labor Relations Board's General Counsel, acting through the Regional Director for Region 26 of the Board, following an investigation by Region 26's Staff.

The Regional Director for Region 26 of the Board issued a Complaint and Notice of Hearing on April 22, 1999, against Aluminum Company of America hereinafter the Company, based on an unfair labor practice charged filed on February 8th, 1999, by Craig Elliott, an individual, hereinafter Elliott.

Specifically, the complaint alleges that Elliott on or about November 13, 1998, November 21, 1998, and December 14, 1998 engaged in concerted protective activities with other employees for the purposes of collective bargaining or other mutual aid or protection by filing grievances through the Union.

500

It is alleged that on December 16, 1998, the Company discharged its employee Elliott, and it did so because Elliott filed or attempted to file the above referenced grievances.

It is alleged the Company's actions against Elliott restrained, coerced and interfered with employees exercise of rights, guaranteed them by Section 7 of the Act, and was done to discourage employees from obtaining or retaining membership in a labor organization.

It is alleged the Company's actions constitute unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act as amended, hereinafter Act.

In its answer to the Complaint, as well as admissions made at trial, the company admits the Board's jurisdiction is properly invoked, and that the United Steelworker's of America, Local 4880, hereinafter Union, is a labor organization within the meaning of Section 2(5) of the Act. Specifically, it has admitted and I find the Company is a corporation with an office and place of business in Bauxite, Arkansas, where it is engaged in the manufacture of aluminum-based products.

During the twelve month period ending March 31, 1999, the Company in conducting its business operations at its Arkansas locations, sold and shipped from its facilities, goods valued in excess of \$50,000 directly to points located outside the State of Arkansas.

During that same time, the Company purchased and received

501

at its Arkansas facility goods valued in excess of \$50,000 directly from points located outside the State of Arkansas. Ac-

cordingly, the parties admit the evidence establishes and I find the Company is an employer engaged in commerce, within the meaning of Section 2(2)(6)(7) of the Act.

The evidence also establishes the parties admit and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

This case, as in most cases, is fact driven. In attempting to establish or defend against the allegations set forth in the complaint, the parties presented numerous exhibits, agreed upon certain facts, and called some 13 witnesses. I carefully observed the witnesses as they testified, and have utilized my observations in arriving at the facts.

I note certain essential facts are undisputed. In setting forth uncontradicted facts, I may attribute such facts to specific witnesses simply for clarification. When necessary to do so, credibility resolutions have been made.

In general, my credibility resolutions are based upon my observations of the witness' demeanor, the weight of the evidence established or admitted facts, and inherent probabilities, and reasonable inferences which may be drawn from the record as a whole.

To the extent that any testimony or evidence not mentioned may be perceived to contradict any findings of fact, I have not

502

disregarded that evidence, but have rejected it, as incredible, lacking in probative weight, surplusage or irrelevant.

It is undisputed the Company and the Union herein have had a long term collective bargaining relationship perhaps dating back to the 50's.

The Company, according to Human Resources Manager Higgs, employs approximately 350 bargaining unit rank and file-type employees at its Arkansas location. It is likewise undisputed that the Company suffered a turndown some years ago, when the work force was reduced considerably.

Human Resources Manager Higgs testified the Company has only hired a limited number of employees since 1982, perhaps as few as 15 or 16. The Company did, however, hire approximately six employees in 1998, one of which was Elliott, the charging party and the alleged discriminatee herein. All of those employees hired in 1998 have been retained with the exception of Elliott. Elliott testified he was hired on October 19, 1998 into the general maintenance day shift on the C&E crew. James Barrett, admittedly a supervisor, was at least for a period of time, Elliott's supervisor.

It is undisputed Elliott was discharged on December 16, 1998 before his probationary period had been completed. The probationary period for employees is outlined in the parties collective bargaining agreement at Section 31, which reads in pertinent part, "There shall be a probationary period of 60 days

503

of actual work, during which time, any new employee shall be entitled to all rights guaranteed under this agreement, except during such time, the Company shall have the sole discretion of discharging or transferring such employee."

The current collective bargaining agreement between the parties is effective from May 31, 1996 to May 31, 2002. Elliott

testified that in November, perhaps November 16, his supervisor notified he and fellow worker, Bill Knight of a shift change. The notification was not timely, according to Elliott, as it pertained to he and Knight, and he complained to Harold Chronister, a union grievance person for the maintenance workers.

Employee and union grievance committee person Chronister testified that Elliott's complaint was that four employees in the shift that were properly notified and timely, but that the notification for he and fellow employee Knight was not timely or proper. Chronister testified he spoke with Supervisor Mitchell about the problem, and Mitchell responded that there was no violation.

Chronister testified he then talked with Maintenance Manager Jack Leggett. A grievance was reduced to writing on a schedule change, and Elliott and Knight were named in the grievance, as the aggrieved individuals.

The grievance was eventually settled, perhaps after Mr. Elliott was discharged.

504

Late in November, approximately November 21, Supervisor Mitchell assigned Elliott and three other employees additional two-hours of overtime on a specific weekend. Elliott testified he asked Supervisor Mitchell if the Company and the Union handled the overtime in the manner Mitchell was doing. Mitchell assured Elliott that he was.

Elliott testified he, thereafter, on November 28th, 1998, spoke with union committee person and fellow employee Chronister about the overtime situation. Chronister told Elliott, according to Elliott, that Supervisor Mitchell had done it all wrong, according to the contract.

Thereafter, union grievance committee person Solomon spoke with Maintenance Manager Leggett about the overtime situation that Elliott had raised. The grievance was eventually settled, it appears, with the monies being paid to a flower fund.

Elliott testified he complained to employees about Supervisor Mitchell on December 11, 1998 in the breakroom at the plant. Elliott testified he said, "Wonder how Kid Mitchell is going to fuck us now." According to Elliott, four other employees were in the breakroom, but he was not aware that Mitchell or other supervisors were in the breakroom, and he was not directing his comments towards Supervisor Mitchell.

505

Electrical Planner and Supervisor, Freddie Tucker testified he was in the breakroom on December 11, 1998 when Elliott made his comments about Supervisor Mitchell. Tucker testified Elliott along with employees Scales and Hunnicutt came into the breakroom where he and others were, and said in a loud voice so that everyone in the room could hear it, "How is Kid Mitchell going to fuck us today."

According to Tucker's testimony, which I credit, he repeated it twice looking straight at Tucker and that he did so in a loud voice, so that everyone in the room could hear what he said. Tucker stated Elliott was talking about scheduling problems.

Elliott testified that on December 14, 1998, while on the roof of Building 415, he observed his Supervisor Barrett performing unit work, specifically using tools to bolt flanges in place.

Elliott attempted to seek union intervention to stop his supervisor from performing unit work. He spoke with a union person, but according to Elliott, later that same day, he observed Barrett again performing unit work. Elliott testified he went to the break or lunchroom to get someone with the union to assist in presenting a violation of the contract by the Company by a supervisor performing unit work. Elliott testified he spoke with unit committeeman Solomon. Elliott testified he complained to Solomon, telling him "If the son-of-a-bitch," meaning Supervisor Barrett, "wanted to be a maintenance man, to get tools, or

506

to get his ass back in the office."

Elliott testified he requested a grievance be filed.

Elliott also told union committeeman Solomon in a loud voice, he stated, because Solomon was hard of hearing, "So you're telling me what we have is chicken-shit bosses out here."

Supervisor Mitchell testified he was in the lunch/breakroom on December 14, 1998, when Elliott spoke with Solomon.

Mitchell testified Elliott asked for a union representative. Mitchell testified Elliott came into the room, "My damned supervisor is working," and called him a "son-of-a-bitch." According to Mitchell, union committeeman Solomon asked Elliott, "Who is your damned supervisor?" According to Supervisor Mitchell, Elliott said he was tired of the son-of-a-bitch doing this, Mitchell testified Elliott said, "If these damned supervisors want to do maintenance work, quit their jobs, and work like he had done."

Mitchell stated Elliott said a grievance needed to be filed on Barrett working with his tools. Mitchell testified other profane words were used by Elliott, such as goddamned and mother-fucker.

Mitchell testified employees came to him after Elliott had made his comments and told him, Mitchell, that he ought not have to tolerate that type of behavior by an employee.

Mitchell said he was told this by specifically employees Robbins and Rowland.

507

Employee Robbins testified he had said he would not put up with that kind of language, that he had heard in the breakroom, but he could not directly say who had made such comments to, nor was he precisely sure what was said in such comments. He could only testify that he wouldn't put up with that.

Rowland testified he told Mitchell he would not put up with this. Rowland, however, admits, under oath, that he has no reservations about lying. But I am persuaded that on this particular point, he spoke the truth, in that he told Mitchell that he, Rowland, would not put up with this kind of conduct.

Mitchell and Tucker eventually reported what they had heard Elliott say to Maintenance Manager Leggett.

Tucker testified he went to Maintenance Manager Leggett's office, to find out what could be done in situations such as what he had heard from Elliott, that he wanted to know what could be done about probationary employees that were not going to

be good employees, that were cursing and raising Cain and conducting themselves in such a manner.

Supervisor Mitchell testified he first went to Bob Sharver's office and when he walked in, he encountered Tucker, and that they discussed the various matters that had involved Elliott. Mitchell and Tucker both reported to Leggett what had transpired on the occasions that they had observed, that involved Elliott. Specifically, Mitchell testified he told Leggett that Elliott had asked for a union representative that Solomon had responded

508

to the question, that Elliott asked to file a grievance, and then he told Leggett the profane language that Elliott had used in the break/lunchroom.

Tucker likewise testified that he told Maintenance Manager Leggett about the conversation he had overheard that Elliott had made in the lunch/breakroom in a loud and boisterous manner.

Maintenance Manager Leggett testified that Mitchell and Tucker portrayed Elliott as a hellraiser, a troublemaker, and that Elliott's profanity and his attitude, both prompted his discharge. Leggett described himself as a middle man in the information chain. He testified he reported the events to Personnel Manager Higgs.

Further, Leggett testified that based specifically on the information provided to him by Tucker, as well as Mitchell, he concluded that Elliott's attitude was that of an arrogant, disrespectful, insubordinate employee.

Leggett testified that Mitchell and Tucker wanted to know what could be done before the probationary period ended, expressing concern about Elliott becoming a regular or full-time employee, after he had completed his probationary period.

Leggett took his information to Human Resources Manager Higgs and recommended that Elliott be discharged.

Elliott was notified of his discharge on December the 16th by Human Resources Manager Higgs in Higgs' office.

509

Elliott was told, according to Elliott, that the Company didn't need his type and his kind. Elliott seeks out union representation, and comes back and a second meeting is held with Higgs plus the union representatives, again, in or near Higgs' office.

The union representatives ask if it is based on any safety complaint, attendance complaint, inability to get along with fellow workers' complaint, or a lie on an application. The answer to each was, no, and again, it was stated that Elliott would not fit in to the work environment of the Company herein. The Union at some point sought to ascertain, based on a rumor, if Elliott was discharged as a result of sexual harassment toward anyone. The response was again that such was not the case.

Boiled down to its over-simplified statement, the Government in this case contents that Elliott engaged in concerted protected activity by seeking to have the collective bargaining agreement between the parties abided by, or that he sought to file grievances and that the Company discharged him for those reasons. In its most simplified form, the Company asserts, that Elliott was a probationary employee, that he engaged in intoler-

able, abusive, foul, disrespectful and insubordinate language and conduct and that he was discharged for those reasons.

The Company further argues that even if it could be established that Elliott engaged in any concerted activity, that his conduct

510

was not protected by the Act, because he had, by his actions, words and conduct moved himself outside the protection of the Act.

The Government concedes that not all concerted activity is protected. But asserts that in this case, the conduct of Mr. Elliott, be it as I have concluded, was not so egregious as to remove Mr. Elliott from the protection of the Act.

A very brief discussion of applicable law is perhaps helpful at this point. What constitutes concerted activity? And if it is concluded that Elliott engaged in concerted activity, was his activity protected activity. And since the parties raised at least in their opening statements and at portions during the trial, the Meyers, M-e-y-e-r-s, *Industries*, definition of concerted activity, I feel it appropriate to elude briefly to that, and I am speaking of *Meyers Industries*, 268 NLRB 493, a 1984 case, which I shall refer to as *Meyers I*, and *Meyers Industries*, 281 NLRB 882, a 1986 case, which I shall refer to as *Meyers II*.

The Board in *Meyers Industries* noted that the concept of concerted action has its basis in Section 7 of the Act. The Board pointed out in *Meyers I* that although the legislative history of Section 7 of the Act, does not specifically define concerted activity, it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal.

The statute requires that the activities under consideration be concerted before they can be protected. As the Board observed

511

in *Meyers I*, indeed Section 7 does not use the term protective concerted activities, but only uses concerted activities. It goes without saying that the Act does not protect all concerted activity.

The Board in *Meyers I* set forth the following definition of concerted activity. "In general, to find an employee's activity to be concerted, we shall require that it be engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation shall be found, if in addition, the employer knew of a concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue was motivated by the employee's protected concerted activity."

Applying those guidelines to this case, the Government has not established that Mr. Elliott engaged in concerted protective activities, as envisioned by *Meyers Industries*. However, the Supreme Court, in *NLRB v. City Disposal Systems*, 465 U.S. 822, a 1984 case, found that an individual employee's invocation of a right contained in a collective bargaining agreement, constituted concerted activity within the meaning of Section 7 of the Act.

Now, before I get to whether or not Elliott engaged in activity, that would fall within what I shall refer to as the *City Disposal Systems* concerted activity theory, I should perhaps elude

512

briefly to the burden test that is placed upon the parties in a case of this nature.

The merits of a 8(a)(1) and an 8(a)(3) case that turns on employer motivation, as I'm persuaded the case herein does, will require an analysis according to the teachings of *Wright Line, Inc.*, 251 NLRB 1083, 1980 enforced 662 F.2d 899, 1st Circuit 1981, cert den; 455 U.S. 989, 1982.

As I stated, the merits of an 8(a)(1) and (3) case that turn on employer motivation will require an analysis according to the *Wright Line* teachings.

In *Wright Line* the Board stated, centrally, at page 1089, "We shall henceforth employ the following causation tests in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation.

First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of a protected conduct."

In *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 1983, the Court affirmed the *Wright Line* analytical scheme.

I would urge in evaluating the *Wright Line* analysis that attention be given to *Manno Electric, Inc.*, 321 NLRB 278 at 280, fn. 12 (1996), where there is a discussion of the District of Columbia

513

Circuit's opinion in *Southwest Merchandising Corp. v. NLRB*, 53 Fd3 1334, 1339-1340, a 1995 case, and the Supreme Court's decision in *Office of Workers Compensation v. Greenwich Collieries* 512 U.S. 267, (1994), and also your attention is invited to *Schaeff Incorporated v. NLRB*, 113 F.d3 264 at 267, fn. 5, DC Circuit 1997, which seems to suggest that the practical effect of *Greenwich Collieries* maybe no more than the abandonment of the expression prima facie case to describe the General Counsel's burden under *Wright Line*.

With all that about *Wright Line*, I shall now attempt to go through the various stages of whether or not the Government has made out a case, and whether if it has made out such a case, it has been rebutted by the Company.

In considering the elements of a protected concerted activity case, as in envisioned in *City Disposal*, there is evidence that the Company through its agents, were aware of Elliott's concerted activity, and that the concerted activity played a role in Elliott's discharge.

It is clear that Plant Manager or correction Maintenance Manager Leggett knew of Elliott's activities in attempting to have the contract complied with, with respect to scheduling of work, overtime, and grievance filing.

Maintenance Manager Leggett recommended that Elliott be discharged, based among other things on his attitude. His attitude, he perceived to be based on information provided to

514

him by Supervisors Mitchell and Tucker to be a hellraiser, to be a troublemaker, to be insubordinate, and to be profane.

The inference be drawn, which I do, that what was reported to him specifically by Supervisor Mitchell and to a degree, as well by Supervisor Tucker, that the profanity for which the Company contends Mr. Elliott was discharged, arose out of, at least in part, Elliott's attempt to find a union representative, so that he might file a grievance.

And I am persuaded that it was that activity, in conjunction with Elliott's profanity that led Maintenance Manager Leggett to recommend his discharge. I don't find it essential that Leggett advise Human Resources Manager Higgs and/or Plant Manager Jarrell of all of the reasons that he recommended Elliott's discharge, in order for the Government to meet its burden, under the Wright Line analysis.

Although Maintenance Manager Leggett liked to describe his function as that solely of a conduit, passing information from first line supervisors to higher management officials, Mr. Leggett cannot and did not move away from the fact that he is the maintenance manager, who has supervisors reporting directly to him, and it is he who made a recommendation that Elliott be discharged and part of that recommendation was based on the fact that Elliott had what he perceived to be an attitude problem, a troublemaker, and a hellraiser. And those descriptive terms, he bases on the information provided to him, which came about as a

515

result of Elliott complaining about what he perceived to be violations of the collective bargaining agreement.

I need not address whether his perceived contract violations had merit or not, it is only that a reasonable belief could be formed that he had a basis for doing so. That reasonable belief has been established in this case, because he consulted with the union representatives, who informed him that they were not following the contract with respect to overtime scheduling and other matters.

I think then we come to the very heart of this case. And that is the question raised by the Company, as to whether Elliott's conduct was in such a manner that it lost the protection of the Act.

Some concerted conduct can be expressed in so intolerable a manner, as to lose the protection of Section 7 of the Act. See for example, *NLRB v. Thor Power Tool Co.*, 351 F.2d 584 at 587, 7th Circuit case. While the legal description of the sort of behavior which withdraws the protection of the Act from concerted activity has varied, *Dreis & Krump Mfg. Co., v. NLRB*, 544 F.2d 320 at 329, 7th Circuit, quoted recently in *Caterpillar, Inc.*, 321 NLRB No. 163, has often been spotlighted for its statement of the test. And the test, as set forth in *Dreis* and *Caterpillar* is, "Communications occurring during the course of otherwise protected activity remain likewise protected, unless

found to be so violent or of such serious character, as to render the

516

employee unfit for further service."

In applying the foregoing or similar standards, the Board has invoked a forfeiture of the protection of the Act, only in cases where the concerted behavior has truly been insubordinate or disruptive of the work process. For that principle, I invite your attention to *Postal Service*, 268 NLRB 274 at 275-276, *Postal Service*, 282 NLRB 686, at 694-695; *Finlay Bros. Co.*, 282 NLRB 737 at 739; *Marico Enterprises*, 283 NLRB 726, at 732; *Elion Concrete*, 287 NLRB 69 at 73.

It has generally been the Board's position that unpleasantries uttered in the course of otherwise protected concerted activity do not strip away the Act's protection. In *Postal Service*, 241 NLRB 389, a letter characterizing acting supervisors as assholes was not beyond the pale.

In *Harris Corp.*, 269 NLRB 733, a letter describing management with such words as hypocritical, despotic, tyrannical was not disqualifying, despite its boorish, ill-bred and hostile tone.

In *Churchill's Restaurant*, 276 NLRB 775, where an employer discharged an employee who he believed was saying that the employer was prejudiced, which the latter considered an insult, the remarks were held not "so offensive as to threaten plant discipline."

A statement to other employees that the chief executive officer was "a cheap son-of-a-bitch" was considered to be protected

517

concerted activity in *Groves Truck & Trailer*, 281 NLRB 1194 at 1195.

The Company herein, like any other employer wants a friction-free working environment, but as the Court of Appeals pointed out in *Thor Power Tool*, 351 F.2d 584, 7th Circuit case, Section 7, activity, may acceptably be accompanied by some impropriety.

The test is a rather stiff one. Whether the activity is of such a serious character, as to render the employee unfit for further service. Does Mr. Elliott's conduct in this case render him unfit for further service?

I am persuaded, based on Board case law, which I am compelled to follow and dutifully do so, that Mr. Elliott's conduct did not remove him from the protection of the Act. Mr. Elliott's conduct was not directed at the specific supervisor involved at the times that he made the comments he made.

While we might hope for a more civil work place, I am persuaded the Board and the Courts have set forth an extremely stiff test that must be met. That is the profanity expressed, the manner it was expressed, the volume it was expressed with, was not of such a nature, as offensive as it was, to render the employee unfit for further service with the Company.

I'm persuaded that's the law, and I shall dutifully apply it. Having said that, I find that the Company has violated Section 8(a)(1) and (3) of the Act, when it discharged Elliott on De-

ember 16, 1998, as I'm persuaded it did so because he attempted

518

to enforce provisions of the collective bargaining agreement, and he attempted to file grievances pursuant to the parties grievance procedure as outlined in the current applicable collective-bargaining agreement.

Accordingly, I shall order that the Company reinstate Elliott to his former position, or if his former position no longer exists, a substantially equivalent position, without prejudice to his seniority or other rights, make him whole for any losses he may have suffered as a result of the unlawful action against him, and post an appropriate notice.

I will when the court reporter has served me with a copy of the transcript, certify those pages of the transcript that constitute my decision. Make any corrections that are necessary thereon, and then serve that on the parties.

It is my understanding that the appeals period runs from the time that I certify the decision to the parties. I invite your attention, however, to the Board's Rules and Regulations, and you will perhaps be more accurate if you follow those in any appeal or exceptions that need be filed.

It is my understanding that the court reporter will provide us with a copy of the transcript within ten working days of today, and as soon as practical thereafter, I will certify my decision to the parties, and at that point, the procedure for appeal, is available to you.

I would like to thank you for your time and attention, and this

519

record is closed.

APPENDIX B

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees for engaging in concerted protected or union activities.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Craig Elliott full reinstatement to his former job, or if his job no longer exists to a substantially equivalent job without prejudice to his seniority or other rights or privileges previously enjoyed; and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order remove from our files any reference to his unlawful discharge, and within 3 days thereafter, notify Craig Elliott, in writing that this has been done and his discharge will not be used against him in any way.

ALUMINUM COMPANY OF AMERICA